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No. 98 720

In The

Supreme Court of the United States

October Term, 1998

JOHN GEORGOPOULOS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the "willfully violate" clause of 29 U.S.C. §186, which prohibits payments from employers to labor union officers, means that in a criminal prosecution under the statute the government must prove that the defendant acted with knowledge that his conduct was unlawful.

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No. _____

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PETITION FOR WRIT OF CERTIORARI

John Georgopoulos petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, pages 1a – 7a) is reported at 149 F.3d 169. The oral opinion of the district court (App., *infra*, pages 8a – 12a) is unreported.

JURISDICTION

The court of appeals entered its judgment on July 24, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §186(d)(2) provides in relevant part, that "any person who wilfully violates this section [which prohibits, with certain exceptions, payments from employers to union officials] shall, upon conviction thereof, be guilty of a felony...."

STATEMENT

Petitioner Georgopoulos was the President of Local 138 of the International Brotherhood of Teamsters. On May 7, 1996, Mr. Georgopoulos, along with other Local 138 officials, was indicted in the United States District Court for the Eastern District of New York. The indictment charged the defendants with acceptance of gratuities from employers in violation of 29 U.S.C. §186 and conspiring to accept such

payments in violation of 18 U.S.C. §371.

During the second trial of the case, Mr. Georgopoulos requested that the court instruct the jury that in order to establish the "willfully violate" element of 29 U.S.C. §186, the prosecution had to have proven that the defendant had knowledge of the unlawfulness of his conduct and the intent to violate the law. The court declined to give the requested instruction, instead instructing the jury that "willfully violate" meant that the defendant acted intentionally.

The jury convicted Mr. Georgopoulos on both counts. The district court sentenced Mr. Georgopoulos to concurrent terms of imprisonment of 13 months and fined him $6000.

In his appeal to the Second Circuit, Mr. Georgopoulos principally argued that the trial court's instruction on the "willfully violate" element of 29 U.S.C. §186 was erroneous. The court of appeals affirmed, holding that the decisions of this Court in Ratzlaf v. United States, 510 U.S. 135 (1994) and Bryan v. United States, 118 S.Ct. 1939 (1998) did not require the court to depart from its earlier construction of the "willfully violate" language of Section 186. The court had previously interpreted that language as not requiring the prosecution to prove the defendant's knowledge of the unlawfulness of his acts or his intent to violate the law. The court relied on the similar holdings of the majority of other circuit courts which have interpreted Section 186 as well as its reading of the history and language of that statute.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Second Circuit Court of Appeals is in Conflict with the Decisions of the Seventh Circuit Court of Appeals

This case presents an important issue of statutory interpretation which has divided the circuit courts.

The Second Circuit recognized that its interpretation of Section 186 conflicted with the decisions of the Seventh Circuit. 149 F.3d at 171.

The Seventh Circuit has consistently held that the willfulness language of Section 186 requires the prosecution to prove that a defendant was aware of or recklessly disregarded the illegality of his conduct. United States v. Papia, 910 F.2d 1357, 1362 (7th Cir. 1990); United States v. Kaye, 556 F.2d 855, 863 (7th Cir.1977); United States v. Incisio, 292 F.2d 374, 380 (7th Cir. 1961).

The Second Circuit reaffirmed its earlier decisions interpreting the "willfully violate" language of Section 186, see United States v. Ricciardi, 357 F.2d 91, 99 (2d Cir.), cert. denied, 384 U.S. 942, 86 S.Ct. 1464, 16 L.Ed.2d 840 (1966); United States v. Ryan, 232 F.2d 481 (2d Cir. 1956), continuing to side with the decisions of the Third, Sixth, Ninth, and Eleventh Circuits. See United States v. Pecora, 484 F.2d 1289, 1294 (3d Cir. 1973); United States v. Carter, 311 F.2d 934, 943 (6th Cir.), cert. denied, 373 U.S. 915, 83 S.Ct. 1301, 10 L.Ed.2d 415 (1963); United States v. Bloch, 696 F.2d 1213, 1216 (9th Cir. 1982); United States v. Phillips, 19 F.3d 1565, 1581-82 (11th Cir. 1994), cert.

denied, 514 U.S. 1003, 115 S.Ct. 1312, 131 L.Ed.2d 194 (1995).

The division of the circuit courts is unlikely to resolve itself.

Since the division arose, this Court has issued two decisions interpreting "willfully violate" clauses in federal criminal statutes--Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994) and Bryan v. United States, 118 S.Ct. 1939 (1998). Both decisions held that to "willfully violate" a criminal statute, a defendant must know his conduct is illegal. Nevertheless, the Second Circuit was not persuaded, still insisting that "willfully violate" as it appears in Section 186 does not have that meaning. The Eleventh Circuit reached the same result after the Ratzlaf decision. United States v. Phillips, 19 F.3d 1565, 1581-82 (11th Cir.1994), cert. denied, 514 U.S. 1003, 115 S.Ct. 1312, 131 L.Ed.2d 194 (1995).

The Seventh Circuit is extremely unlikely to change its position, buttressed, as it is, by the Ratzlaf and Bryan decisions.

This Court's intervention is necessary to resolve the conflict in the circuits, thereby assuring uniform interpretation of an essential element of a federal criminal statute.

2. The Decision of the Second Circuit Court of Appeals is Erroneous, Particularly in Light of this Court's Decisions in Ratzlaf v. United States and Bryan v. United States and the Rule of Lenity.

This Court has had occasion to interpret "willfully violate" clauses of criminal statutes twice in the past five years. Both in Ratzlaf v. United States, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), which involved the currency structuring statute, and Bryan v. United States, 118 S.Ct. 1939 (1998), which involved the firearms statute, this Court began its analysis with the assumption that "in order to establish a 'willful' violation of a statute, 'the government must prove that the defendant acted with knowledge that his conduct was unlawful.'" Bryan, 118 S.Ct. at 1945 (quoting Ratzlaf, 510 U.S. at 137, 114 S.Ct. at 657). In Ratzlaf, this Court reversed the conviction, holding that to eliminate the knowledge of unlawfulness requirement, as the Ninth Circuit had done in interpreting the currency reporting statute and the Second Circuit did in this case, is to read the willfulness element right out of the statute. 510 U.S. at 140, 114 S.Ct. at 659.

There is no principled basis for interpreting the "willfully violate" language contained in 29 U.S.C. §186 differently than the identical language contained in the currency reporting and firearms statutes involved in Ratzlaf and Bryan and in the other federal criminal statutes which have been interpreted to impose a knowledge of unlawfulness requirement. See United States v. Frade, 709 F.2d 1387, 1392 (11th Cir. 1983) and United States v. Tooker, 957 F.2d 1209 (5th Cir.), cert. denied, 506 U.S. 864, 113 S.Ct. 187, 121 L.Ed.2d 131 (1992) (both interpreting 50 U.S.C. Appx. § 5 (Trading with the Enemy Act)); United States v. Kerley, 838 F.2d 932, 936, 942 (7th Cir. 1988) and United States v. Schmucker, 815 F.2d 413, 421 (6th Cir. 1987)(both interpreting 50 U.S.C. Appx. § 462(a) (criminal penalties provision of Military Selective Service Act)).

Moreover, federal criminal statutes should be interpreted uniformly. At least with regard to the essential elements of an offense, the same word should have the same or similar meaning throughout the United States Code--thereby permitting judges, lawyers, law enforcement officers and average citizens to read a criminal provision of the United States Code and know what it prohibits. See Bryan v. United States, 118 S.Ct. 1939, 1951 (Scalia J. dissenting)("fostering uniformity in the interpretation of criminal statutes" will improve the administration of justice).

The historic principle of lenity dictates that any ambiguity in the meaning of the "willfully violate" language of 29 U.S.C. §186 should be resolved in favor of the defendant. Adamo Wrecking Co. v. United States, 434 U.S. 275, 284, 98 S.Ct. 566, 572, 54 L.Ed.2d 538 (1978)(Rehnquist, J.)(reaffirming principle that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

In the face of this Court's definitions of "willfully violate" in Ratzlaf and Bryan and the rule of lenity, the Second Circuit nonetheless insists that the "willfully violate" language of Section 186 does not mean that a defendant must be aware of the unlawfulness of his conduct.

The court based its decision first on the proposition that "'willfully' is a word of many meanings whose construction is often dependent on the context in which it appears." 149 F.3d at 171 (citing Bryan, 118 S.Ct. at 1944-45).

But the Second Circuit omitted the corollary of this proposition, which is that "as a general matter, when used in the criminal context, a 'willful' act is one undertaken with a bad purpose." Bryan, 118 S.Ct. at 1945. If there is an exception to the general rule, it is where a statute prohibits a willful act--which may be defined merely as something intentional. See Browder v. United States, 312 U.S. 335, 341, 61 S.Ct. 599, 603, 85 L.Ed. 862 (1941) (interpreting willful use of a passport in 22 U.S.C. §220 to mean intentional use). But "one cannot willfully violate a statute without knowing what the statute prohibits." United States v. Jain, 93 F.3d 436,440 (8th Cir. 1996), cert. denied, 117 S.Ct. 2452, 138 L.Ed.2d 210 (1997). In sum, although "willful" might mean different things in different contexts, there is no way that a "willful" violation of a statute can mean anything other than acting with knowledge of the unlawfulness of one's conduct.

The Second Circuit also relied on an analysis of the 1984 amendments to Section 186. Those amendments added an additional *mens rea* requirement in a new subsection, 186(d)(1), which applied to technical violations of the prohibition against payments, such as employer contributions to pension funds which were not in compliance with regulatory requirements. For these violations, Congress added to the "willfully violate" requirement the additional requirement that the defendant act with the intent to benefit himself or another person. The court reasoned that this addition showed that "when Congress wished to provide for a heightened *mens rea* requirement... it stated its intentions explicitly." 149 F.3d at 172.

But Congress had already provided for a

"heightened" *mens rea* requirement in the original statute by limiting criminal liability under the statute to those who violate it willfully. In the amendments, Congress left the "willfully violate" language intact. If Congress had meant to impose criminal liability on mere intentional actors it could have substituted the term "knowingly" in the original statute or in the 1984 amendments. It should be presumed that Congress knew what it was doing and meant what it enacted.

The Second Circuit's final rationale for its decision also rested on the 1984 amendments to Section 186. The court assumed that when Congress amended Section 186 in 1984 it must have known that the majority of the circuits had interpreted "willfully" in Section 186 as meaning intentional rather than with knowledge of unlawfulness. By not clearly indicating that the amendment to the statute overruled the cases which had adopted that standard of willfulness, reasoned the court, Congress signaled its approval of that definition. 149 F.3d at 172.

This method of statutory construction does not seem appropriate in criminal cases where the basic principle of lenity prevails. Even if it were appropriate to interpret a criminal statute this way, it would be especially problematic where, as with this issue, the circuits were split. For which interpretation was Congress signaling its approval? If Congress were signaling approval of the majority interpretation, one would expect Congress to send a message to the Seventh Circuit that its interpretation was erroneous. Including the "willfully violate" requirement in the new penalty provision, Section 186(d)(1), and keeping that requirement in the existing penalty provision, Section 186(d)(2), surely did not convey that message. After all,

Congress' familiarity with existing law presumably extended to those cases holding that willfulness is generally accepted as requiring knowledge of unlawfulness. See e.g. United States v. Frade, 709 F.2d 1387, 1390 (11th Cir. 1983) ("[w]hen used in a criminal statute "the word 'willfully' ... generally connotes a voluntary, intentional violation of a known legal duty."). If anything, the 1984 amendments should be read to endorse the Seventh Circuit's interpretation of Section 186.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: October 22, 1998
New York, New York

Respectfully Submitted,

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[1] Counsel for petitioner is scheduled to be admitted to the bar of this Court on November 9, 1998. The Court's admissions office advised that it would be permissible to file this petition, given the pending motion for admission.

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APPENDIX

SW

St. Louis West, Inc. (7388)

Appendix A

[Opinion of the United States Court of Appeals for the Second Circuit, Decided July 24, 1998 [Pages 1a – 7a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: July 16, 1998* Decided: July 24, 1998)

Docket Nos. 98-1190, 98-1202

UNITED STATES OF AMERICA,

Appellee,

—v.—

JOHN GEORGOPOULOS and ROBERT SKERIES,

Defendants-Appellants,

BRADY WINSTEAD,

Defendant.

Before:

CABRANES and REAVLEY,** *Circuit Judges,*
and JONES,*** *District Judge.*

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* This case was heard pursuant to an order of the Chief Judge of the United States Court of Appeals for the Second Circuit under 28 U.S.C. § 46(b) certifying a judicial emergency.

** The Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit, sitting by designation.

*** The Honorable Barbara S. Jones of the United States District Court for the Southern District of New York, sitting by designation.

Appendix A
[Opinion of the USCA for the Second Circuit]

Defendants-appellants John Georgopoulos and Robert Skeries appeal from a March 27, 1998 judgment of the United States District Court for the Eastern District of New York (Denis R. Hurley, *Judge*) convicting them, after a jury trial, of conspiracy to accept payments as officers of a labor organization, in violation of 18 U.S.C. § 371, and acceptance of payments as officers of a labor organization, in violation of 29 U.S.C. § 186(b). Appellants' principal contention on appeal is that the district court erred in failing to instruct the jury that the "willfulness" element of 29 U.S.C. § 186 requires a finding of specific intent.

Affirmed.

JASON SOLOTAROFF, New York, NY, *for Appellant John Georgopoulos.*

SPIROS A. TSIMBINOS, Kew Gardens, NY, *for Appellant Robert Skeries.*

PATRICIA NOTOPOULOS, Assistant United States Attorney, Eastern District of New York (Zachary W. Carter, United States Attorney, David C. James and Emily Berger, Assistant United States Attorneys, on the brief) *for Appellee.*

PER CURIAM:

Defendants-appellants John Georgopoulos and Robert Skeries appeal from a March 27, 1998 judgment of the United States District Court for the Eastern District of New

Appendix A
[Opinion of the USCA for the Second Circuit]

York (Denis R. Hurley, *Judge*) convicting them, after a jury trial, of conspiracy to accept payments as officers of a labor organization, in violation of 18 U.S.C. § 371, and acceptance of payments as officers of a labor organization, in violation of 29 U.S.C. § 186(b).[1] The district court sentenced each appellant principally to 13 months' imprisonment, three years' supervised release, and a $6,000 fine. Both Georgopoulos and Skeries challenge the sufficiency of the evidence on both counts and the district court's instruction on the willfulness element of the 29 U.S.C. § 186 offense. In addition, Skeries claims that the indictment was "duplicitous" and challenges two of the district court's evidentiary rulings.

We write only to address the appellants' contention that the district court erred in its jury instruction on the "willfulness" element of the substantive crime, 29 U.S.C. § 186 ("Section 186"). The penalty provision applicable to the appellants' conduct, 29 U.S.C. § 186(d)(2),[2] specifies the punishment for those who "willfully violate" Section 186's prohibition against union officials' acceptance of payments from employers. At trial, both appellants asked the district court for a specific intent instruction on "willfulness"—that is, an instruction that the government was required to prove that the appellants had acted with bad purpose and with knowledge that their conduct was unlawful. The district court rejected

---

1 29 U.S.C. § 186(a)(1) provides in pertinent part that "[i]t shall be unlawful for any employer . . . to pay . . . any money or other thing of value to any labor organization, or any officer or employee thereof, which represents . . . any of the employees of such employer."

29 U.S.C. § 186(b)(1) provides in pertinent part that "[i]t shall be unlawful for any person to request . . . or accept . . . any payment . . . or other thing of value prohibited by subsection (a) of this section."

2 29 U.S.C. § 186(d)(2) provides in pertinent part that "any person who willfully violates [subsection 186(b)(1)] shall, upon conviction thereof, be guilty of a felony and subject to a fine of not more than $15,000, or imprisoned for not more than five years, or both."

their request, and instead instructed the jury that the government needed only to prove that the appellants' conduct was deliberate and voluntary.

The appellants acknowledge that we have long held that, as used in Section 186, "willfully" does not require a showing of bad purpose or of unlawful intent. *See United States v. Ricciardi*, 357 F.2d 91, 100 (2d Cir.), *cert. denied*, 384 U.S. 942 (1966) *and* 385 U.S. 814 (1966); *United States v. Ryan*, 232 F.2d 481, 482-83 (2d Cir. 1956). Nonetheless, they claim that we are required to revise that holding in light of the Supreme Court's decisions in *Ratzlaf v. United States*, 510 U.S. 135 (1994), and *Bryan v. United States*, ___ U.S. ___, 118 S. Ct. 1939 (1998). In *Ratzlaf*, the Supreme Court held that the "willfulness" element of the antistructuring provision of the Money Laundering Control Act of 1986, 31 U.S.C. § 5324, required a showing that the defendant acted with knowledge that his conduct was unlawful. *See* 510 U.S. at 549. At issue in *Bryan* was the "willfulness" element of 18 U.S.C. § 922(a)(1)(A), as amended by the Firearms Owners' Protection Act in 1986. In its discussion, the Court noted that "*as a general matter*, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 118 S. Ct. at 1945 (emphasis supplied; footnote and internal quotation marks omitted). We do not agree that these decisions require a revision of our longstanding interpretation of the "willfulness" element of Section 186.

First, neither *Ratzlaf* nor *Bryan* disturbed the well-settled proposition that "willfully" is "a word of many meanings whose construction is often dependent on the context in which it appears." *Bryan*, 118 S. Ct. at 1944-45 (internal quotation marks omitted); *see also Ratzlaf*, 510 U.S. at 141

(same). And we, along with the majority of other Circuits to have considered the issue, have consistently held that, in the context of Section 186, "willfully" requires only a finding of general intent. *See United States v. Phillips*, 19 F.3d 1565, 1581-82 (11th Cir. 1994) (decided after *Ratzlaf*), *cert. denied* 514 U.S. 1003 (1995); *United States v. Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States v. Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States v. Carter*, 311 F.2d 934, 943 (6th Cir.), *cert. denied*, 373 U.S. 915 (1963). *But see United States v. Papia*, 910 F.2d 1357, 1362 (7th Cir. 1990) (willfulness requires "an awareness of or reckless disregard for" Section 186(d)'s restrictions).

Second, the history and structure of Section 186 lend support to our view that the statute requires only a finding of general intent. Section 186 may be broken into five basic components. Subsection 186(a) prohibits employers from making payments to "representatives" of their employees or to union officials. Subsection 186(b) prohibits representatives and union officials from receiving such payments. Subsections 186(c)(1) through (c)(3) set forth certain categorical exceptions to the prohibitions set forth in subsections 186(a) and (b). Subsections 186(c)(4) through (c)(9) identify certain types of payments, particularly contributions to employee trust funds and pension plans, that are permitted if specified requirements are met. Finally, subsections 186(d)(1) and (2) set forth the penalties for violating Section 186.

Until 1984, Section 186 had only one penalty provision, subsection 186(d), which provided that anyone convicted of "willfully violat[ing]" any provision of Section 186 would be guilty of a misdemeanor punishable by a fine of not more than $10,000 and/or by imprisonment of up to one year. Congress ultimately found these penalties "inadequate" to "protect the legitimacy of labor relations" and determined that the "sanctions need[ed] to be made more firm." S. Rep.

No. 98-225 at 297 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3477. Accordingly, in 1984, Congress amended Section 186 so that any violation involving a payment of more than $1,000 would constitute a felony punishable by a fine of up to $15,000 and/or up to five years' imprisonment.

In enacting these increased penalties, however, Congress also "recognize[d] that a wide range of [Section 186] violations do not involve payoffs or bribes, but simply fail to meet the detailed requirements" for the exemptions set forth under subsections 186(c)(4) through (c)(9). *Id.* Accordingly, Congress created a separate penalty provision, subsection 186(d)(1), to deal exclusively with violations involving those exemptions. Subsection 186(d)(1) provides that, to be convicted of violating subsections (c)(4) through (c)(9), one must have acted "willfully and with intent to benefit himself or to benefit other persons *he knows are not permitted to receive a payment . . . under subsections (c)(4) through (c)(9).*" (emphasis supplied). All other violations of Section 186 are addressed in subsection 186(d)(2). Like its predecessor provision, subsection 186(d), which had been in effect since the enactment of Section 186 in 1947, subsection 186(d)(2) requires proof only that an individual acted "willfully."

Two points emerge from this analysis. First, it is clear that when Congress wished to provide for a heightened *mens rea* requirement—as in the case of violations of subsections 186(c)(4) through (9)—it stated its intentions explicitly. Second, at the time that Congress amended Section 186 in 1984—leaving unchanged the *mens rea* requirement for all violations not involving subsections 186(c)(4) through (c)(9)—four Circuits had already interpreted Section 186 to require only a finding of general intent. Because we may assume that Congress was aware of existing law at the time it amended Section 186, *see Miles v. Apex Marine Corp.*,

498 U.S. 19, 32 (1990), we may reasonably conclude that Congress approved of the then-prevalent interpretation of Section 186's "willfulness" element.

For all of these reasons, we adhere to the well-settled law of this Circuit that the "willfulness" element of Section 186 requires only a finding of general intent.

We have considered the appellants' remaining arguments and find them to be without merit.

Accordingly, the judgment of the district court is affirmed.

Appendix B
[Oral Opinion of the United States District Court of the Eastern District of New York [Pages 8a— 12a]

Colloquy

AFTERNOON SESSION

(The following occurred outside the presence of the jury.)

THE COURT: Firstly, let me rule on this issue that was raised before the luncheon recess.

Having had approximately one hour to make a decision in this regard, my decision is, for the reasons that I'll indicate in a moment, that the Court's charge as originally given in this case during the course of the prior trial correctly states the intent element for a violation of Section 186 of Title 29.

The issue, of course, is whether the appearance of the word "willfully" in Section 186(d) (2) requires the government to prove general intent or whether the government is required to prove specific intent.

Prior to the luncheon recess, when this issue was discussed briefly, there was brief mention of Cheek v United States, 498 U.S. 192 (1991).

In reviewing that case, I do note that the opinion firstly recognizes that the word "willful" does not have the same meaning across-the-board. Its meaning depends on the statutory context in which it is used.

Appendix B
[Oral Opinion of the USDC of the EDNY]

In Cheek, the definition of "willful," which would dovetail with the request made by Mr. Solotaroff on behalf of Mr. Georgopoulos here, rested in large measure on the complexity of the Internal Revenue code and Congress' desire to have individuals not appropriately charged with a violation of the section unless it was some showing that they realized that what they did was in fact violative of the Internal Revenue code.

The case of Ratzlaf, which is R-a-t-z-l-a-f, Ratzlaf against the United States, 114 Supreme Court 655 (1994) was cited by the defense and it was one of the prime cases urged by the defense. That case, while citing Cheek for the proposition -- let me withdraw that.

That case mentions that the Supreme Court has recognized that the word "willful" is a word of many meanings, and that its construction is often influenced by its context.

The targeted statute in Ratzlaf was the statute which prohibits the structuring of currency transactions with financial institutions so as to avoid the reporting requirements where a deposit in excess of $10,000 is made into a financial institution.

I do note in Ratzlaf, that the Court places some emphasis on the fact that the particular subchapter of the penal statute involved had been interpreted as requiring a specific intent to commit the crime when other subsections of the subchapter were involved.

Appendix B
[Oral Opinion of the USDC of the EDNY]

And the Court notes that it would be inappropriate to have the word "willful," which appears in various locations in a particular statute, to be interpreted differently. As the Court notes "if courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated."

More significantly, however, the Supreme Court notes that there are a number of reasons why a person would structure currency transactions and yet not intend to violate the law. The Court cites a host of examples along those lines.

In any event, the Court did conclude that in that case, that "willful" required the government to show a specific intent to violate the law. A specific intent to violate the law indicates that the government would have to prove that the person knew that what they were doing was a violation of law.

A brief effort, and again with the time constraints that's all that could be done over the luncheon recess to shepardize Ratzlaf to determine how it has been applied in other contexts, suggests that the Second Circuit, at least, typically has been unreceptive to interpreting Ratzlaf beyond its application to money structuring transactions.

Obviously this is a very interesting issue. I commend defense counsel for raising it.

Appendix B
[Oral Opinion of the USDC of the EDNY]

One thing that I've learned is that in the future I will be very careful to enforce my court rule, that requests to charge should be submitted on the first day of the trial. Had that been done here, I might have been able to devote a little more time to this.

But in any event, the point has been raised, it was wise by the defense to raise it, and I feel fairly comfortable with my conclusion.

The conclusion that I reach rests primarily on the rationale espoused by the Eleventh Circuit in United States against Phillips, 19 F. 3d 1565 (Eleventh Circuit 1994).

The issue now before me which apparently has not been the subject of decision by the Second Circuit was an issue of first impression when the matter was presented to the Eleventh Circuit in the Phillips case.

At pages 1576 through to page 1582, the Eleventh Circuit analyzes section 186(d)(2) with respect to the issue of whether a specific intent charge was required because of the fact that the word "willfully" appears in the section.

As part of that analysis, it cites, with approval, the case of United States v Cody, a decision rendered in this circuit in, I believe, 1983.

Appendix B
[Oral Opinion of the USDC of the EDNY]

In any event, the Court adopts the holding in the Phillips case and the Cody case and therefore declines to charge in the manner requested by defendants. This would be true for both defendants.

MR. TSIMBINOS: Yes, I wanted to make that clear.

THE COURT: With respect to the word "willfully."

Supreme Court, U.S.
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No. 98-720

In the Supreme Court of the United States

OCTOBER TERM, 1998

JOHN GEORGOPOULOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the intent element of 29 U.S.C. 186(d)(2)—which makes it a crime when any person "willfully violates" Section 186's prohibition against payments from employers to representatives of their employees —requires a jury finding that the defendant acted with knowledge that his conduct was unlawful.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 149 F.3d 169.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 1998. The petition for a writ of certiorari was filed on October 22, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to accept payments from an employer to an officer of a labor organization, in violation of 18 U.S.C. 371, and of willfully accepting or aiding and abetting the acceptance of such payments, in violation of 29 U.S.C. 186(b)(1) and (d)(2) and 18 U.S.C. 2. He was sentenced to 13 months' imprisonment, to be followed by three years' supervised release, and was fined $6,000. Pet. C.A. App. A159-A164; Pet. App. 2a-3a. The court of appeals affirmed. *Id.* at 1a-7a.

1. In 1986, petitioner and his co-defendant, Robert Skeries, were elected president and vice-president, respectively, of Local 138 of the International Brotherhood of Teamsters. Members of Local 138 worked primarily as truck drivers and warehousemen for food manufacturers and wholesalers. Gov't C.A. Br. 3.

Petitioner and Skeries took office in January 1987. During the Christmas season of their first year in office, several employers offered them payoffs in the guise of Christmas gratuities, which they agreed to accept. From 1987 through 1994, they accepted more than $100,000 in payoffs from employers. Gov't C.A. Br. 3-11, 30.

2. Petitioner was indicted on one count of conspiracy to violate 29 U.S.C. 186(b)(1), and one count of a substantive violation of Section 186(b)(1). Section 186(b)(1) makes it generally "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." In turn, Section 186(a)(2) makes it generally "unlawful for any employer * * * to pay, lend, or

deliver, or agree to pay, lend, or deliver, any money or other thing of value * * * to any labor organization, or any officer or employee thereof, which represents * * * any of the employees of such employer." Certain exceptions to those prohibitions are set forth in Section 186(c). Under 29 U.S.C. 186(d)(1), any person who "willfully and with intent to benefit himself or to benefit other persons" accepts a payment that does not meet the requirements for the exceptions set forth in subsections (c)(4) through (9) is guilty of a crime. Under Section 186(d)(2), any person who otherwise "willfully violates" the proscriptions of Section 186 is guilty of a felony, unless the money or thing of value accepted does not exceed $1,000, in which case the person is guilty only of a misdemeanor.

At trial, petitioner requested that the court instruct the jury that "'[w]illfully' means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say with the bad purpose to disobey or to disregard the law." Pet. C.A. App. A97; Pet. App. 3a. The district court declined to give the jury petitioner's definition of "willfulness." *Id.* at 3a-4a. Instead, the court charged that the government had to prove beyond a reasonable doubt that petitioner

> acted knowingly and willfully [in that he] knew what he was doing and that he did it deliberately and voluntarily, and not because of mistake, accident or inadvertence.
>
> All that is necessary to prove a willful violation for purposes of Count Two is that the defendant had knowledge of the payments and knowledge that payments came from an employer whose workers he represented.

> The government is not required to prove with respect to Count Two that a union official who was accused of taking unlawful payments of money from employers or persons whom the official's union represents did so with an evil or bad purpose.
>
> It is not necessary for purposes of Count Two that the government prove that the defendant had knowledge or awareness of any particular statutory prohibition or of the fact that such an act or omission is prohibited by law.
>
> All that the government is required to prove with respect to Count Two regarding the alleged willful and knowing violation is that the defendant acted with knowledge of the operative facts constituting the offense.

Pet. C.A. App. A86-A87.

3. On appeal, petitioner acknowledged circuit precedent holding that, as used in Section 186, the term "willfully" does not require a showing of bad purpose or knowledge of illegality. Pet. App. 4a. Petitioner contended, however (*ibid.*), that this Court's decisions in *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), and *Bryan* v. *United States*, 118 S. Ct. 1939 (1998), required such a showing.

The court of appeals affirmed. The court "adhere[d] to the well-settled law of this Circuit that the 'willfulness' element of Section 186 requires only a finding of general intent." Pet. App. 7a. The court explained that "neither *Ratzlaf* nor *Bryan* disturbed the well-settled proposition that 'willfully' is 'a word of many meanings whose construction is often dependent on the context in which it appears.'" *Id.* at 4a (quoting *Bryan*, 118 S. Ct. at 1944-1945, and citing *Ratzlaf*, 510 U.S. at

141). The court also observed that the majority of circuits that have considered the issue have consistently held that, as used in Section 186, "'willfully' requires only a finding of general intent." *Id.* at 5a (collecting cases).

The court further concluded that "the history and structure of Section 186" support its interpretation of the term "willfully." Pet. App. 5a. The court noted that, before its amendment in 1984, Section 186 had only one penalty provision (then found at Section 186(d)), which punished willful violations of Section 186, and that this penalty provision had been interpreted by the courts as requiring only proof of general intent. *Id.* at 5a-6a. It then observed (*id.* at 6a-7a) that, when Congress amended Section 186(d) in 1984, it divided that Section into two subsections: Section 186(d)(1)—which deals exclusively with violations covered by Section 186(c)(4)-(9) (governing contributions to employee trust funds and pension plans)—and Section 186(d)(2)—which punishes all other violations of Section 186. Section 186(d)(1), unlike Section 186(d)(2), requires that one have acted "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment" under the covered provisions. See Pet. App. 6a. The court found it "clear" from this language that, "when Congress wished to provide for a heightened *mens rea* requirement * * * it stated its intentions explicitly." *Ibid.* The court therefore concluded that, by "leaving unchanged the *mens rea* requirement" in Section 186(d)(2) "for all violations not involving subsections 186(c)(4) through (c)(9)," Congress allowed the court "reasonably [to] conclude that Congress approved of the then-prevalent interpretation of Section 186's 'willfulness' element." Pet. App. 7a.

ARGUMENT

Petitioner contends that, to prove that he acted "willfully" within the meaning of 29 U.S.C. 186(d)(2), the government was required to show that he knew that his conduct was unlawful. Pet. i, 5-10. The court of appeals correctly rejected that argument. This Court recently denied review on the same issue in *Phillips* v. *United States*, 514 U.S. 1003 (1995) (No. 94-831), and there is no reason for a different result here.

1. "The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system." *Cheek* v. *United States*, 498 U.S. 192, 199 (1991). Petitioner argues that Section 186(d)(2) presents an exception to that general rule because it prohibits conduct only when a person "willfully violates" the proscriptions of Section 186. That argument is without merit.

As this Court has observed on many occasions, "willfully" is "a word of many meanings," and its construction is "often dependent on the context in which it appears." See, *e.g.*, *Bryan* v. *United States*, 118 S. Ct. 1939, 1945 (1998); *Spies* v. *United States*, 317 U.S. 492, 497 (1943). The context of Section 186(d)(2) makes clear that, to establish a violation of Section 186, Congress required proof only that the defendant acted with knowledge of his actions, and not also knowledge that those actions were illegal. Before subsection (d) was amended in 1984, it provided that "[a]ny person who willfully violates any of the provisions of * * * section [186] shall * * * be guilty of a misdemeanor." 29 U.S.C. 186(d) (1982). When Congress amended subsection (d) in 1984 to make some violations of Section 186 felonies, it divided subsection (d) into two parts. Subsection (d)(1) applies to payments that are illegal

because they do not satisfy certain technical requirements of subsections (c)(4)-(9). For those violations, Section 186(d)(1) requires proof that the person participating in the payment acted "willfully and with intent to benefit himself or to benefit other persons he knows are not permitted to receive a payment." Subsection (d)(2) applies to all other illegal payments that are not covered by subsection (d)(1), *i.e.*, payments prohibited by subsections (a) and (b) for which Congress did not provide any exception in subsection (c). For those violations, subsection (d)(2) requires proof only that the parties participating in the payment "willfully violate[d] this section."

In light of that statutory scheme, the court of appeals correctly concluded (Pet. App. 6a) that Section 186(d)(2) requires proof only that the defendant acted with knowledge of his actions, and not also proof that he acted with knowledge that those actions were illegal. "[I]t is clear that when Congress wished to provide for a heightened *mens rea* requirement—as in the case of violations of subsections 186(c)(4) through (9)—it stated its intentions explicitly." *Ibid.* Congress did not impose any such heightened intent requirement in Section 186(d)(2), however. There is, therefore, no basis in the statute for imposing a heightened *mens rea* requirement of proof that the defendant knew his conduct was illegal.

That analysis is supported by the background and legislative history of the 1984 amendments to Section 186. When those amendments were enacted, it had already been established as the majority rule in the courts of appeals that Section 186(d) did not require the government to prove that a defendant knew his conduct

was unlawful.[1] The amendments to Section 186 were enacted as part of Chapter VIII of the Comprehensive Crime Control Act of 1984, and were identical to amendments passed by the Senate in 1983.[2] The Senate committee reports accompanying the 1984 Act and the 1983 bill indicate that Congress included the "intent to benefit" language in Section 186(d)(1) because it was concerned that, under existing law, "willfully" carried the connotation of general intent, and that, absent a requirement of "intent to benefit," a person could be prosecuted for violations of the new technical requirements of subsections (c)(4) through (9) even if he believed his actions were lawful. See S. Rep. No. 225, 98th Cong., 1st Sess. 298 (1983); S. Rep. No. 83, 98th Cong., 1st Sess. 12-13 (1983). The original committee report also noted, however, that the transactions proscribed by the new subsections (c)(1) through (3) "are not likely to be innocently motivated." *Ibid.* Therefore, the committee determined "not to include a specific intent requirement for prosecutions under subsection (d)(2). The mens rea requirement for prosecutions under subsection (d)(2) will continue to be 'willfully.'"

---

[1] See *United States* v. *Bloch*, 696 F.2d 1213, 1216 (9th Cir. 1982); *United States* v. *Pecora*, 484 F.2d 1289, 1294 (3d Cir. 1973); *United States* v. *Overton*, 470 F.2d 761, 767 (2d Cir. 1972), cert. denied, 411 U.S. 909 (1973); *United States* v. *Carter*, 311 F.2d 934, 943 (6th Cir.), cert. denied, 373 U.S. 915 (1963); but see *United States* v. *Inciso*, 292 F.2d 374, 380 (7th Cir.) (stating that Section 186(d) "contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section"), cert. denied, 368 U.S. 920 (1961).

[2] See Comprehensive Crime Control Act of 1984, Pub. L. No. 96-473, Tit. II, § 801, 98 Stat. 2131; S. Rep. No. 225, 98th Cong., 1st Sess. 297 & n.1 (1983); cf. 129 Cong. Rec. 16,367, 16,378 (1983); S. Rep. No. 83, 98th Cong., 1st Sess. 2 (1983).

Ibid. Because Congress left the willfulness requirement of former Section 186(d) unchanged when it created Section 186(d)(2), it is presumed that Congress intended "willfully" to require a finding only of general intent. See *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990) ("We assume that Congress is aware of existing law when it passes legislation.").

2. Petitioner argues (Pet. 5-8) that, under *Ratzlaf* v. *United States*, 510 U.S. 135 (1994), and *Bryan* v. *United States*, 118 S. Ct. 1939 (1998), Section 186(d) must be read to require proof that the defendant knew that his actions were illegal. That contention is incorrect.

In *Ratzlaf*, the Court held that the statutory prohibition against structuring currency transactions to avoid reporting requirements, which punished one who "willfully violat[ed]" that prohibition, required proof that the defendant knew that the structuring was unlawful. See 510 U.S. at 138, 149. But as the Court subsequently explained, the decision in *Ratzlaf* was based in large part on the fact that the statute at issue was "highly technical" and "presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 118 S. Ct. at 1946-1947; see also *Bates* v. *United States*, 118 S. Ct. 285, 290 n.6 (1997) (explaining that *Ratzlaf* was based on the "particular statutory context of currency structuring"). By contrast, Section 186 broadly "outlaws all payments, with stated exceptions, between employer and [employee] representative." *United States* v. *Ryan*, 350 U.S. 299, 305 (1956). Section 186(b)(1) establishes a straightforward ban on a union officer's acceptance of payments from an employer; its "reciprocal" provision, Section 186(a), is an equally straightforward ban on an employer's payments to any representative of its employees. See *Arroyo* v. *United States*, 359 U.S. 419, 423 (1959). Thus, unlike

the technical currency structuring statute at issue in *Ratzlaf*, Section 186(b)(1)'s payment ban is simply worded and readily comprehensible, and Section 186(d)(2)'s "willfully violates" language need not be construed to require knowledge of illegality in order to avoid the imposition of criminal sanctions on persons whose conduct is inadvertent.

In *Bryan*, the defendant contended that 18 U.S.C. 924(a)(1)(D)—which punishes one who "willfully" violates various provisions of federal law relating to firearms, including 18 U.S.C. 922(a)(1)(A), prohibiting dealing in firearms without a federal license—required proof, not just that the defendant knew that his conduct was unlawful, but also the "more particularized showing" (118 S. Ct. at 1945) that he knew of the federal licensing requirement (*id.* at 1942). The government acknowledged that the willfulness element in Section 924(a)(1)(D) required it to show that the defendant knew that his conduct was unlawful, because other provisions of Section 924(a) impose criminal penalties on one who "knowingly" violates other federal firearms statutes. See 118 S. Ct. at 1943, 1945-1946. The Court observed in *Bryan* that, because "'knowingly' does not necessarily have any reference to a culpable state of mind or to knowledge of the law," it was reasonable to conclude that "knowingly" in that statute referred to a factual knowledge, and that "willfully" referred to an "evil-meaning mind." *Id.* at 1945-1946.

The structure of Section 186(d) is quite different from that of 18 U.S.C. 924(d). No offense in Section 186(d) requires proof simply of a "knowing" violation of the law. To the contrary, the element of willfulness, which is required for violations of Section 186(a) and (b), is the lesser of the two *mens rea* elements contained within the statute. See pp. 3, 6-7, *supra*. Accordingly, it is

reasonable to conclude that, in Section 186(d)(2), Congress used the term "willfully" only to denote a knowing, voluntary act. See *Bryan*, 118 S. Ct. at 1945 n.12 (observing that "the word [willfully] often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental"); *Cheek*, 498 U.S. at 209 (Scalia, J., concurring in the judgment) (noting that, "in many contexts, [the word] 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful").

3. Petitioner also contends (Pet. 4-5) that the decision below conflicts with decisions of the Seventh Circuit. Review on that basis is not warranted.

Petitioner acknowledges (Pet. 4-5) that, like the Second Circuit, the Third, Sixth, Ninth, and Eleventh Circuits have rejected the argument that Section 186(d)(2) requires proof that the defendant knew his conduct was illegal. See pp. 7-8, *supra* (discussing pre-1984 case law); see also *United States* v. *Phillips*, 19 F.3d 1565, 1581-1582 (11th Cir. 1994), cert. denied, 514 U.S. 1003 (1995). Petitioner argues, however, that "[t]he Seventh Circuit has consistently held that the willfulness language of Section 186 requires the prosecution to prove that a defendant was aware of or recklessly disregarded the illegality of his conduct." Pet. 4. It is not clear, however, that there is a genuine conflict between the Seventh Circuit and the circuits adhering to the majority rule.

In *United States* v. *Inciso*, 292 F.2d 374, 380, cert. denied, 368 U.S. 920 (1961), the Seventh Circuit held that "the term 'willfully violates' in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section." Then, in *United States* v. *Keegan*, 331 F.2d 257, cert. denied, 379 U.S. 828 (1964), the Seventh Circuit ex-

plained that "[t]he minimum proof to convict under [Section] 186," *i.e.*, "reckless disregard for that section," means "actual knowledge" of the "material facts surrounding the proscribed conduct" plus "knowledge that this conduct is likely to be illegal"—by which the *Keegan* court meant that "a reasonable man would be aware that such conduct would likely be illegal," *id.* at 262. In applying those standards, however, the *Keegan* court upheld an instruction that defined "willfully" as "knowingly and intentionally," further defined "knowingly" to require "only a knowledge of the existence of the facts in question, when those facts are such as to bring the act or omission within the prohibition of the law," and charged that there was no requirement "that there be any knowledge or awareness that such act or omission is in fact prohibited by law." *Id.* at 261. As the Eleventh Circuit has noted, a jury instruction like the one approved in *Keegan* is the "practical equivalent of a general intent jury instruction." *Phillips*, 19 F.3d at 1581 n.27.

More recently, in *United States* v. *Papia*, 910 F.2d 1357, 1362 (1990), the Seventh Circuit appeared to reaffirm its holding in *Inciso* that Section 186(d) requires "an awareness of or reckless disregard for § 186(d)'s restrictions." In *Papia*, however, the court upheld the trial court's jury instruction that "[a]n act is done 'willfully' if done voluntarily and intentionally, and with the intent to do something the law forbids; that is to say, with a purpose either to disobey or disregard the law," against the defendant's contention that the trial court should have required the government to show that she acted with an intent to benefit herself or another. *Ibid.* (emphasis omitted). Because the court concluded that the jury was given a specific intent instruction similar to the one requested by the

defendant, it had no occasion to decide whether Section 186(d)(2) required such an instruction.

Moreover, the *Papia* court did not consider the legislative history of the 1984 amendments to Section 186(d), and it did not have the benefit of the extensive analysis of the statutory structure and legislative history undertaken by the Eleventh Circuit in *Phillips*, *supra*, and now by the court of appeals below. If the issue should return to the Seventh Circuit, it may reconsider its approach to Section 186(d) in light of those recent decisions. And since the definition of "willfully" in Section 186(d) has been litigated in the courts of appeals only three times since 1984, there does not appears to be any pressing need for this Court to decide the issue now.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1998